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95-4181

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STATE OF ALABAMA,

PETITIONER

VS.

EDDIE JEROME TUCKER,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION OF THE STATE OF ALABAMA, PETITIONER

OF

JEFF SESSIONS, ATTORNEY GENERAL

AND

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45 pp

QUESTION PRESENTED

Where an officer lawfully detains a party on the basis of reasonable suspicion relating to a certain sort of contraband and observes in the party's possession, a small container which is recognized by the officer as being the sort commonly used to hold the suspected contraband, and the party, in response to an inquiry by the officer about the contents of the container, seeks to hide the container behind his back, may the officer briefly detain the container and inspect it for the limited purpose of determining if it contains the suspected contraband, where such inspection is the least intrusive means available for making such determination?

THE PARTIES

In the Circuit Court of Tuscaloosa County, Alabama, the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were Eddie Jerome Tucker, who is Respondent herein, as Defendant, Appellant, and Petitioner, respectively, and the State of Alabama, who is Petitioner herein, as Plaintiff, Appellee, and Respondent, respectively.

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION OF THE STATE OF ALABAMA,
PETITIONER

The State of Alabama, Your Petitioner respectfully prays that a writ of certiorari issue to review the opinion and orders of the Supreme Court of Alabama in the above cause.

OPINIONS AND ORDERS BELOW

The order of the Circuit Court of Tuscaloosa County, Alabama, refusing to suppress the evidence found and seized in this case is not reported, and is submitted as Appendix "A" to this petition.

The memorandum opinion of the Court of Criminal Appeals of Alabama, affirming the Circuit Court's judgment is not reported and is submitted as appendix "B" to this petition.

The opinion and orders of the Supreme Court of Alabama reversing the judgment of the Court of Criminal of Alabama and denying rehearing are not yet reported but will be reported as follows:

Ex parte Eddie Jerome Tucker

___ So. 2d ___ (Ala, 1995)

Copies of the same are submitted as Appendices "C" and "D" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama denying rehearing was issued on June 9, 1995, and this petition is filed within ninety (90) days of said date. This Honorable Court's Jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Alabama Supreme Court believed that its decision was mandated by the Fourth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Your Petitioner is making a claim under the same said

provisions. Said constitutional provisions read as follows:

"AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"AMENDMENT XIV

"Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or

> immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

The issues in this case do not involve any statutory provisions.

Respondent Tucker was convicted of possession of marijuana in the first degree under Section 13A-12-213, Code of Alabama, 1975. He was sentenced under Section 13A-5-9 of the same Code. Copies of these statutes are set out in Appendix "E" to this petition.

STATEMENT OF THE CASE

The Respondent, Eddie Jerome Tucker, was indicted by the Grand Jury of Tuscaloosa County, Alabama, in July of 1992, for possession of marijuana in the first degree. On April 15, 1993, he waived arraignment and pleaded not guilty (R. pp. 1a-2 and 24)

The Respondent filed a motion in the Circuit Court of Tuscaloosa County seeking to suppress evidence found on his person and in his automobile. A hearing was held on the motion, and, on August 5, 1993, the Trial Court overruled the motion to

suppress[1] . (Appendix A") (R. pp. 11, 16-19 and 23-24)

On September 10, 1993, the cause was submitted to the Trial Court on an agreed statement of facts. The Trial Court found an adjudged the Respondent guilty as charged. The Respondent was sentenced as an habitual offender to three years imprisonment. (R. pp. 25, 28, and 50-51)

The Respondent appealed his conviction to the Court of Criminal Appeals of Alabama, which, on May 6, 1994, affirmed his conviction with an

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[1]The authorities cited by the Trial Judge indicate that he found that the officers acted on probable cause.

unpublished memorandum opinion. (Appendix "B") The Court of Criminal Appeals found that the officers' actions up to their obtaining and inspecting the Respondent's film canister were justified by reasonable suspicion, and that the Respondent's furtive action in hiding the canister behind his back, coupled with "...knowledge that film canisters are commonly used to package drugs....". (Appendix "B"), established probable cause to detain and inspect the canister. (Ibid.)

The Respondent obtained review in the Supreme Court of Alabama. On May 12, 1995, the Supreme Court, with three Justices dissenting, reversed the Respondent's conviction. The Court rejected the Petitioner State's argument

that the Respondent consented to the officer's action by voluntarily turning over the canister in response to the officer's request, because of the officer's emphatic tone of voice and his failure to warn the Respondent that he, the Respondent, need not consent. The Supreme Court agreed with the lower courts that the officer had reasonable suspicion as to the Respondent, but rejected their findings that probable cause existed as to the film canister. The basis of such rejection was a determination that it was possible to interrupt the Respondent's action of putting the canister behind his back as other than a furtive act and a film canister could contain something other than illegal drugs. The authorities

cited in support of the Court's holding were federal and state cases interpreting the Fourth Amendment to the Constitution of the United States. The Court then went on to hold that the contraband found in the Respondent's car was the "fruit of the poisonous tree." (Appendix "C")

The petitioner state applied for rehearing, but the same was overruled on June 9, 1995. (Appendix "D")

STATEMENT OF THE FACTS

At the suppression hearing two witnesses testified for the state, and the defense presented no evidence. The following facts are, therefore, undisputed.

The area of Tuscaloosa, Alabama, where the incident at issue in this case occurred was known to the police as a high crime area, known for narcotics. Two or three weeks before this incident, the house where it occurred had been the subject of a search warrant which had resulted in the arrest of the owner for illegal alcohol sales. When the police arrived to execute the warrant, a number of patrons of the establishment, who were outside of the front of the building, had

dispersed. Cocaine and marijuana abandoned by these persons was found on the porch. (Tr. pp. 6-9 and 24-25)

On October 9, 1992, Captain Olen Lee and Sergeant William A. Hurter, a narcotics investigator, were on patrol as part of a high profile patrol team designed to discourage crime in the area. At 1:00 or 1:30 p.m, the officers observed a number of men standing around the front of the house, some of them partially in the street. Sergeant Hurter pulled the patrol car to the curb so that Captain Lee was only three feet from one of the men, Respondent Tucker. As he exited the vehicle, Captain Lee noticed a large bulge in the Respondent's right front pocket. Lee asked the Respondent, "...what it was

and would he take it out and let me see it...." (Tr. p.11) The Respondent complied, and produced a thirty-five millimeter film canister. (Tr. pp. 9-12, 25-27 and 31-32)

Sergeant Hurter, the experienced narcotics officer, had seen such film canisters used to hold drugs on, "...several hundred....", (Tr. p. 27), occasions. Hurter testified:

> "Q All right. What if anything occurred after he retrieved the object from his pocket?
>
> "A Well, he held it out and we saw it. At that time, I asked him what was in it. And that is when he stuck it behind his back. And when he started trying to conceal it, after he pulled it out of his pocket, I had asked him to let me see it and he brought it out from behind his back and handed me the canister. At that time, I opened the canister up.

"Q Okay. He voluntarily handed you the canister?

"A Yes sir." (Tr. p. 27)

Opening the canister, Hurter discovered five $10.00 bags of marijuana. (Tr. p. 27)

At that point, Sergeant Hurter advised the Respondent of his rights and obtained a voluntary oral waiver. Hurter then asked the Respondent if he had a vehicle, and the Respondent pointed out an automobile parked nearby. Hurter asked, "...if he'd mind if I looked in his car [,] at which time he handed me a set of car keys...." (Tr. p. 31) An examination of the car revealed twenty six more $10.00 bags of contraband. The Respondent acknowledged ownership of the drugs and admitted selling them. (Tr. pp. 27-31)

SUMMARY OF THE ARGUMENT

1. This case present an important novel question, namely, where officers lawfully detain a party pursuant to reasonable suspicion and observe a small container which they reasonably suspect contains contraband, may they detain the container and inspect it for the suspected contraband, where there is no less intrusive method available to resolve the suspicion. This Honorable Court has held that under such circumstances, suspicious containers can be detained briefly. United States v. Place 462 U.S. 696, 77 L. Ed 2d 110, 103 S. Ct. 2637 (1983) But, the court has never had the opportunity to decide whether a small suspicious

container may be inspected pursuant to reasonable suspicion.

2. The Alabama Supreme Court claimed to decide this case under the Federal Constitution, but violated every precedent of the Honorable Court on the nature of probable case. The precedents of this Honorable Court clearly show that Sgt. Hurter had probable cause when he procured and inspected the Respondent's film canister.

ARGUMENT

The Alabama Supreme Court ruled that:

"... [T]he officers were justified here in stopping to question the persons gathered in front of a shot house in a high crime area. See Terry v. Ohio, 392 U.S. 1 (1968). Just as the officers, for their own safety, would have been justified also in frisking those assembled, id, Capt. Lee was justified in asking to see what was in Mr. Tucker's pocket; Capt. Lee could clearly see a bulge in Mr. Tucker's pocket; that, without inspection, could not be conclusively identified as not being a weapon.[2] The

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[2]It should be pointed out that asking the Respondent to remove and display the object was less intrusive than a "pat down".

> question, then, is whether Sgt. Hurter's search and seizure of the film canister after Mr. Tucker had responded to his question concerning its contents by putting the canister behind his back was supported by probable cause...." (Mns. op. pp. 8-9; Appendix "C", pp. 18-19)

The Court then went to hold that Sgt. Hurter's action was not supported by probable cause.

The Petitioner state submits that the Alabama Supreme Court erred in two regards. First, since Sgt. Hurter's action was clearly the least intrusive means of resolving the suspicion about the canister and was by its nature narrowly limited, the action was justified by the very reasonable suspicion which the Alabama Court found to justify the investigative stop. Second, the Alabama

Supreme Court erred in finding no probable cause.

I

IN RE: INVESTIGATIVE STOP

REASON FOR GRANTING THE WRIT:

NOVEL QUESTION

For the purposes of this discussion, we assume that the Alabama Supreme Court was correct in finding that the officers had reasonable suspicion, but did not have probable cause.

In Terry v. Ohio, (392 U.S. 1, 20 L. Ed 2d 889, 88 S. Ct. 1868 [1968]), this Honorable Court recognized the constitutional propriety of stops and brief detainments of persons based on articulable reasons to suspect their involvement in criminal activity. The purpose of such investigative stops is to

resolve the suspicions, and it is, therefore obvious that the authority to make such stops includes the authority to engage in limited investigative activities. The stop must be brief and any investigative must be directed toward the suspected criminal activity.

The question in this case is whether an officer, who makes an investigative stop related to drugs and who has reasonable suspicion that a small container in the detainee's possession contains drugs, may briefly detain the container and examine it to see if it contains the suspected contraband. This Honorable Court has held that a container may be briefly detained on reasonable suspicion, but, although this question

arises in many investigation stops, this Honorable Court has never had the opportunity to decide whether a small detained container may be opened and examined on such basis.

In United States v. Place, (462 U.S. 696, 77 L. Ed 2d 110, 103 S. Ct. 2637 [1983]), this Court decided that a traveler's luggage could be briefly detained on the basis of reasonable suspicion that it contained narcotics. The Court wrote:

> "... In sum, we conclude that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of Terry and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative

detention is properly limited in scope...." (462 U.S. 696, 706, 77 L. Ed 2d 110, 120)[3]

See also United States v. Sokolow 490 U.S. 1, 104 L. Ed 2d 1, 109 S. Ct. 1581 (1989).

Place and Sokolow involved luggage, but the Court recognized the propriety of brief detainments on reasonable suspicion, even though the Court in Place recognized that the seizure of a traveler's luggage, "... intrudes on both the suspects' possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary...." (Place 462 U.S. 696,

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[3]The Court also approved dog sniffing in Place, but ultimately held that the ninety minute delay thereby occasioned was, under the circumstances, unreasonable.

708, 77 L. Ed 2d 110, 121) The instant case does not involved luggage but a small film canister. It is most difficult to see how detaining the canister for a few minutes intruded on the Respondent any more than the original stop. Compare Pennsylvania v. Mimms 434 U.S. 106, 54 L. Ed 2d 331, 98 S. Ct. 330 (1977)[4] We submit

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[4]"... we are asked to weigh the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the order to get out of the car. We think this additional instruction can only be described as de minimis...." (434 U.S. 106, 111, 54 L. Ed 2d 331, 337)

that under Place and Sokolow, Sgt. Hurter was justified in briefly detaining the Respondent's film canister.

Of course, Sgt. Hurter did not merely detain the canister, he opened it and determined that it did indeed contain drugs. This Honorable Court has never had the opportunity to address this issue. However, it should be noted that at issue in this case is a very small container; determining whether it contained drugs required only opening it and looking. There was never any question of, "...an officer's rummaging through the contents of ...luggage ...." (United States v. Place, above, 462 U.S. 696, 707, 77 L. Ed 2d 110, 121.) Thus, the intrusion was very

slight and limited by the very size of the container.

In Florida v. Royer, (460 U.S. 491, 504, 75 L. Ed 2d 229, 241, 103 S. Ct. 1319 [1983]), the Court condemned activities incident to an investigate stop which were more intrusive than necessary. Royer gave rise to the proposition that, in the case of an investigative stop, officers must limit their investigative activities to the least intrusive means of resolving their suspicion. In this case, Sgt. Hurter could not have obtained a search warrant, if he lacked probable cause as held by the Alabama Supreme Court. The Fourth Amendment expressly provides, "... no warrant shall issue, but upon probable cause...." In addition, obtaining a

warrant would have occasioned a prolonged detention of the canister. Sniffing by a drug dog would have resolved the suspicion, but even if a dog could have been produced in fifteen minutes, the intrusion on the Respondent's rights would have been greater than that occasioned by simply opening the little container and observing what it contained. In the final analysis, Sgt. Hurter's opening the container was the lest intrusive way to resolve the suspicious.

We submit that, although this Honorable Court has never addressed this issue directly, its controlling decisions support Sgt. Hurter's actions, even if he did not have more than reasonable suspicion.

II

IN RE: PROBABLE CAUSE

REASON FOR GRANTING THE WRIT: CONFLICT WITH THE CONTROLLING DECISIONS OF THIS HONORABLE COURT

The Alabama Supreme Court's finding that the officers in this case did not have probable cause was contrary to this Honorable Court's teachings on several different subjects. First, the Alabama Supreme Court did not consider the totality of the facts known to the officers; instead, the Court examined each fact independently. Second, the Court

confused probable cause with proof beyond a reasonable doubt

In Illinois v. Gates, (462 U.S. 213,238, 76 L. Ed 2d 527, 548, 103 S. Ct. 231 [1983]), this Honorable Court re-affirmed that the proposition that the question of probable cause is to be decided on the basis of the totality of the circumstances. Yet, in analyzing the factors found by the lower courts to establish probable cause, the Alabama Supreme Court examined each factor separately. The Alabama Supreme Court rejected the finding of probable cause, because the individual factors did not amount to probable cause. In so ruling, the Court ruled contrary to this Honorable Court's decisions on probable cause.

In addition, in reviewing the facts found by the lower courts to establish probable cause, the Alabama Supreme Court rejected several because there was reason to doubt whether the factor necessarily warranted a conclusion of wrongdoing. For example, the Court discussed at length the proposition that a film canister may be an innocent item, i.e. that there is a reason to doubt that a given film canister contains drugs. (Mns. op. pp. 11-12; Appendix "C", p. 24) The Court also pointed out that putting an item behind one's back is not necessarily furtive, (Mns. op. pp. 15-18; Appendix "C" pp. 32-37), i.e. that it is possible to put a different interpretation on the Respondent's action than that perceived by

the officer. In applying a reasonable doubt standard or, more accurately, a "reason to doubt standard" to probable cause, the Alabama Supreme Court violated every principle of probable cause, as well as the very name "probable cause". Locke v. United State 7 Cranch 339, 348, 3 L. Ed 364, 367 (1813); Brinegar v. United States 338 U.S. 160, 176, 93 L. Ed 1879, 1890-1891, 69 S. Ct. 1302 (1949); Jones v. United States 362 U.S. 257, 271, 4 L. Ed 2d 697, 708, 80 S. Ct. 725 (1960); United States v. Ventresca 380 U.S. 102, 107, 13 L. Ed 2d 684, 688, 85 S. Ct. 741 (1965); United States v. Cortez 449 U.S. 411, 418, 66 L. Ed 2d 621, 629, 101 S. Ct. 690 (1981); Illinois v. Gates, above, 462 U.S. 213, 235-236, 76 L. Ed 2d 527, 546-547.

In this case, the officers had the following information:

1. The area was so troubled with crime that their Department had established a special unit to patrol it for the protection of residents.

2. The area was particularly well know for drugs.

3. The location where the encounter took place was in front of a recently raided illegal liquor establishment at which the two different drugs had been found.

4. The Respondent was one of a number of men congregated in front of the house and partially in the street.

5. When the officers stopped,[5] they asked about the bulge in the Respondent's trouser pocket, and he readily displayed the film canister.

6. Sgt. Harter had seen such film canisters used to hold drugs on several hundred occasions.

7. When Sgt. Hurter asked the Respondent what was in the film canister, the Respondent said nothing but sought to hide it behind his back.

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[5]Any citizen can park his car and engage in conversation with persons in a public area. Officers have no less right. No justification was required for this action by the officers. See I.N.S. v. Delgato 466 U.S. 210, 80 L. Ed 2d 247, 104 S. Ct. 1758 (1984).

It can be readily admitted that none of these listed factors compels the conclusion that the canister necessarily contained drugs. Indeed, all of the factors together fail to compel such a conclusion, but that is not the issue on probable cause. The issue is whether, Sgt. Hurter was reasonable in reaching the conclusion that it probably contained drugs. The precedents of this Honorable Court clearly show that Sgt. Hurter's plain view observation of the canister, coupled with his expertise and the Respondent's apparently furtive gesture, established probable cause. Texas v. Brown 460 U.S. 730, 742-743, 75 L. Ed 2d 502, 514, 103 S. Ct. 1535 (1983) (tied off green party balloon); Colorado v.

Bannister 449 U.S. 1, 3, 66 L. Ed 2d 1, 4, 101 S.Ct. 42 (1980) (Chrome lug mats)

Probable cause authorized the seizure of the canister, and the inspection of its contents. See United States v. Jacobsen 466 U.S. 109, 80 L. Ed 2d 85, 104 S. Ct. 1652 (1984).

CONCLUSION

In conclusion your Petitioner, the State of Alabama, respectfully submits that in this case the Supreme Court of Alabama erroneously resolved a novel question and ruled contrary to the decisions of this Honorable Court in every case addressing the issue of probable cause. In addition, this case provides an opportunity to resolve an important novel question which often arises in investigative stops.

Therefore, Your Petitioner prays that this Honorable Court will issue a writ of certiorari and will review the matters complained of and reverse the decision of

Supreme Court of Alabama.

Respectfully submitted,

JEFF SESSIONS

ATTORNEY GENERAL

BY:

_____

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